

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THOMAS BOUCHER, et al.,

Plaintiffs,

v.

FIRST AMERICAN TITLE INSURANCE
COMPANY,

Defendant.

CASE NO. C10-199RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on the motion (Dkt. # 83) of Plaintiffs Thomas and Carol Boucher to certify a class comprised of Washington homeowners who purchased title insurance from Defendant First American Title Insurance Company (“First American”) during certain refinancing transactions. The parties requested oral argument, but the court finds oral argument unnecessary in light of its disposition today. For the reasons stated herein, the court DENIES Plaintiffs’ motion without prejudice to their election to renew their motion prior to August 5, 2011.

II. BACKGROUND

The court begins with the deceptively simple foundation of this case: all title insurance companies in Washington are required to file their policy prices with the state’s Insurance Commissioner, and they may not charge premiums that exceed those prices.

1 RCW § 48.29.140(2).¹ Until late 2007, First American had 17 rate manuals covering
2 different sets of Washington counties. It now has 5 rate manuals. None of the rate
3 manuals are complex. They set “general schedule” rates that increase incrementally with
4 the policy amount, which is typically the amount that the customer borrows in the
5 mortgage transaction. A “mortgage reorganization” rate of 50% of the general schedule
6 rate applies, generally speaking, when a lender’s title insurance policy is already in place
7 for the property and a new deed of trust on the same property is executed by the same
8 buyer. For now, the court relies on simpler terms: people who refinance their mortgages
9 in Washington are typically entitled to a 50% discount on their title insurance, so long as
10 they obtained a qualifying title insurance policy for their lender in connection with their
11 prior mortgage.

12 Plaintiffs contend that First American overcharges people who are entitled to the
13 50% discount. To begin with, they contend that First American overcharged them for
14 title insurance when they refinanced their Skagit County home in September 2005. They
15 believe they were entitled to a 50% discount on a filed rate of \$735, or a premium of
16 \$367.50. Instead, they paid \$821.

17 Plaintiffs did not purchase their title insurance directly from First American.
18 Instead, they relied on an out-of-state settlement agent, who billed them for a First
19 American policy that Alliance Title Company (“Alliance”) issued. Stuczynski Decl.
20 ¶¶ 37-45. The settlement agent had no affiliation with First American. Alliance was a
21 First American agent at the time, but there is a dispute about whether Alliance was
22 authorized to issue policies in Washington. There is also a dispute about whether First
23 American was ever paid for the policy Alliance issued, or whether Alliance simply
24 pocketed the premium. Moreover, it appears that Alliance charged the settlement agent

25 ¹ Recent changes to the law have led to the Insurance Commissioner issuing new rules governing
26 the filing and approval of title insurance rates. *See* RCW § 48.29.140(4) (requiring
27 Commissioner to adopt rules for filing in compliance with new statutory framework at RCW
28 § 48.29.143 and § 48.29.147); WAC § 284-29A-030 (setting transition timetable that eliminates
RCW § 48.29.140 rates by January 1, 2012).

1 \$455 for the policy it issued. *Id.*, Exs. D&E. The settlement agent nonetheless charged
2 Plaintiffs \$821.

3 Most of First American's title insurance sales in Washington are less
4 controversial. In the 13 counties where First American maintains its own "title plant," it
5 sells title insurance directly to customers. About 25 authorized agencies sell First
6 American insurance in other Washington counties. Those agencies are independent
7 entities, but they require First American's authorization to sell its policies. First
8 American does not monitor every policy that its agents sell to determine if the customer
9 was properly charged, but it periodically audits rate compliance. There is no question
10 that First American has the power to require its independent agents to comply with its
11 pricing policies.

12 Plaintiffs hope not only to redress their own overcharge, but Ms. Boucher hopes to
13 represent a class of all Washingtonians who were entitled to the 50% discount from First
14 American but did not receive it.² She is not alone in seeking to represent a statewide
15 class of First American refinance customers. At least five federal courts in other states
16 have certified classes of First American customers who claim to have been overcharged
17 when they bought title insurance while refinancing. Indeed, Plaintiffs themselves have
18 attempted to participate in at least two such lawsuits. Mr. Boucher first appeared as a
19 putative class representative in June 2008 in the Eastern District of Michigan, joining a
20 Michigan plaintiff in an effort to certify a class of First American customers in several
21 states, including Washington. While a motion to transfer the Michigan suit to this court
22 was pending, Plaintiffs moved in December 2009 to intervene as class representatives in
23 *Lewis v. First American*, a similar action pending in the District of Idaho on behalf of
24 First American customers in 5 states, including Washington. The next month, the
25 Michigan court transferred its case to this court. The Idaho court ultimately certified only

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27 ² Mr. Boucher had a stroke in 2009 and has been unable to participate in this litigation since. For
28 that reason, only Ms. Boucher seeks appointment as a class representative.

1 a class of Idaho residents in *Lewis*, and denied Plaintiffs' motion to intervene in
2 September 2010.

3 The record reveals very little about how many Washingtonians First American
4 deprived of the 50% refinance discount. First American has identified about 170,000
5 customers who obtained title insurance from it in refinance transactions. The court has
6 no idea over what time period those transactions occurred, because no party addresses
7 that question. First American provided the 170,000 figure in response to an interrogatory
8 that it answered in November 2009 about transactions going back to the beginning of
9 1997. Terrell Decl. (Dkt. # 82), Ex. H (response to Pltfs.' Interrog. No. 6). First
10 American's response incorporated general objections that any transactions prior to May
11 2003 were beyond the statute of limitations, but it is not clear whether the number it
12 provided reflects that limitation. *Id.* The evidence reflects, therefore, that over
13 somewhere between 6 and 12 years, 170,000 Washingtonians bought title insurance from
14 First American in refinance transactions. First American suggests that the 170,000 figure
15 is unreliable, because its records do not reliably segregate between refinance customers
16 and initial purchase customers.

17 Not all refinance transactions, however, qualify for the 50% discount. First
18 American's rate manuals require that a refinanced property be subject to a prior lender's
19 title insurance policy to qualify for the discount. Some of the rate manuals require the
20 same borrower for both the prior transaction and the refinance transaction. First
21 American contends that many refinance transactions do not qualify for the 50% discount.
22 Many lenders, even large institutional lenders, do not obtain title insurance, or purchase
23 limited policies. This is especially true when the prior loan is not a first-position
24 mortgage, but rather a home equity loan or similar subordinate obligation. Sellers who
25 personally finance mortgages often eschew title insurance. Also, customers who paid off
26 their prior mortgage are not eligible for the refinancing discount.

1 In repeating First American's list of circumstances that disqualify refinancing
2 customers from the 50% discount, the court must emphasize that there is no evidence
3 before it that reveals how often these circumstances occur. Neither First American nor
4 Plaintiffs have provided such evidence. On the record before the court, there is no way to
5 estimate the fraction of First American refinancing customers who do not qualify for the
6 50% discount.

7 There is also no way, on the record before the court, to estimate the number of
8 First American customers who qualified for the 50% discount but did not receive it.
9 Plaintiffs themselves are in this category, as are as many as 3 other First American
10 customers: Steven Bell, Clint and Claudia Hooper, and Rodney and Diana Kirkpatrick.³
11 Plaintiffs apparently learned of these 3 customers during their pre-litigation investigation,
12 although there is no evidence before the court as to the scope or methodology of that
13 investigation. Plaintiffs have been seeking to represent a class of Washingtonians since
14 at least June 2008 (when they first appeared in this lawsuit while it was pending in
15 Michigan), and it appears that their counsel has been seeking to represent a Washington
16 class for several years before that. Plaintiffs have had ample opportunity to use discovery
17 and other means to assess how many customers First American overcharged. So far as
18 the record reveals, their sole effort to do so was to request a sample of records of First
19 American customers who obtained only a lender policy.⁴ They requested 400 records;
20 they received 200. Preston Decl. (Dkt. # 94), Ex. B at 26 (Req. for Production No. 31).
21 There is no evidence as to how First American selected those 200 records.

22 Of the 200 records Plaintiffs received, they contend that 7 of them are evidence of
23 customers who were entitled to the 50% discount but did not receive it. It appears that
24

25 ³ Where spouses or others bought property and title insurance together, the court refers to them
as a single First American customer.

26 ⁴ When a person buys a home initially, she must typically purchase a title insurance policy for
27 herself as well as one for her mortgage lender. In refinance transactions, no owner's policy is
necessary.

1 the sole records First American produced for these 200 customers were its HUD-1
2 settlement statements. Those statements reflect both the amount of the loan and the
3 amount the borrower paid for the lender's title policy. Plaintiffs compared those amounts
4 to First American's rate manuals and identified 7 customers who allegedly overpaid.
5 T.W., S.&D.T., M.J.M., L.L., R.&R.W., J.G., and P.E.⁵ Schwartzman Decl. ¶¶ 11-19 &
6 Ex. C.⁶

7 First American argues that it did not overcharge 5 of the 7 customers Plaintiffs
8 identified. For those 5 customers, First American argues (via the declaration of its
9 underwriting counsel) that "other documents" in its possession reveal either that the
10 customer did not qualify for the 50% discount, or that the HUD-1 information about the
11 amount of the loan is inaccurate, and that the policy was properly priced based on the
12 correct loan amount. Stuczynski Decl. (Dkt. # 95) ¶¶ 22-27. First American has not filed
13 the "other documents" with the court. First American's counsel's description of these
14 "other documents" would hardly seem to be the best evidence of their contents, but
15 Plaintiffs have offered no objection. Indeed, Plaintiff offers neither evidence nor
16 argument to counter First American's contention that it properly charged these 5
17 customers.

18 First American implicitly admits that its records do not rule out the possibility that
19 2 of the 7 customers Plaintiffs identified were entitled to the 50% discount but did not
20 receive it. Stuczynski Decl. (Dkt. # 95), ¶ 28. It contends however, that it cannot
21 "conclusively determine" whether the customers qualified for the discount because First
22

23 ⁵ First American has insisted that its business records containing information identifying its
24 customers are confidential. Several motions to seal are pending addressing this issue and others.
The court uses customer initials where there is a dispute about whether their names should be
kept confidential. The court will address the motions to seal in a separate order.

25 ⁶ First American moved to strike Plaintiffs' evidence of the review of the 200 records because it
26 came in the form of a declaration from Plaintiffs' counsel, who used his declaration to
27 summarize his review of the HUD-1 statements First American provided. At this stage in the
litigation, there is no need to strike counsel's declaration, which does little more than summarize
the contents of the HUD-1 statements and First American's rate manuals.

American's files do not contain a copy of a prior lender's title policy. *Id.* First American admits, again implicitly, that the lack of evidence of a prior policy in its records does not determine whether the customers in question actually had such policies.

Thus, after four years of litigation, the evidence of the number of First American customers who were entitled to the 50% discount but did not receive it is as follows:

- As many as 170,000 Washington customers might have qualified for the discount, but that number is unreliable for a number of reasons.
- For various reasons, some of those 170,000 customers did not qualify for the 50% discount, but there is no competent evidence of how many customers did not qualify, and no basis to even make a reasonable estimate.
- Plaintiffs' pre-litigation investigation identified 3 other customers who First American arguably overcharged. Through discovery, they identified 2 customers out of a sample of 200 who might have been overcharged. There is no evidence as to how First American compiled that sample.

On this record, Plaintiffs ask the court to certify a class of all Washingtonians whom First American wrongfully denied the 50% discount.

III. ANALYSIS

A. Class Certification Standards

The court's decision to certify a class is discretionary. *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009). Fed. R. Civ. P. 23 ("Rule 23") guides the court's exercise of discretion. A plaintiff "bears the burden of demonstrating that he has met each of the four requirements of Rule 23(a) and at least one of the [three alternative] requirements of Rule 23(b)." *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 724 (9th Cir. 2007). Rule 23(a) requires a plaintiff to demonstrate that the proposed class is sufficiently numerous, that it presents common issues of fact or law, that it will be led by one or more class representatives with claims typical of the class, and that the class representative will adequately represent the class. *Gen. Tel. Co. of the S.W. v. Falcon*,

1 457 U.S. 147, 161 (1982); Fed. R. Civ. P. 23(a). If a plaintiff satisfies the Rule 23(a)
2 requirements, she must also show that the proposed class action meets one of the three
3 requirements of Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186
4 (9th Cir. 2001).

5 In considering Rule 23's requirements, the court must engage in a "rigorous
6 analysis," but a "rigorous analysis does not always result in a lengthy explanation or in-
7 depth review of the record." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 961 (9th Cir.
8 2005) (citing *Falcon*, 457 U.S. 147, 161 (1982)). The court is neither permitted nor
9 required to conduct a "preliminary inquiry into the merits" of the plaintiff's claims.
10 *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975) (citing *Eisen v. Carlisle &*
11 *Jacquelin*, 417 U.S. 156, 177 (1974)); *see also* Fed. R. Civ. P. 23 advisory committee's
12 note (2003) ("[A]n evaluation of the probable outcome on the merits is not properly part
13 of the certification decision"). As long as the court has "sufficient material before [it] to
14 determine the nature of the allegations, and rule on compliance with [the] requirements
15 [of Rule 23], and [it] bases [its] ruling on that material, [its] approach cannot be faulted
16 because plaintiffs' proof may fail at trial." *Blackie*, 524 F.2d at 901. The court may
17 assume the truth of a plaintiff's substantive allegations, *id.* at 901 n.17, but may require
18 more than bare allegations to determine whether a plaintiff has satisfied the requirements
19 of Rule 23. *See, e.g., Clark v. Watchie*, 513 F.2d 994, 1000 (9th Cir. 1975) ("If the trial
20 judge has made findings as to the provisions of the Rule and their application to the case,
21 his determination of class status should be considered within his discretion.").

22 The court now applies these standards to Plaintiffs' allegations and evidence.

23 **B. Plaintiffs Have Not Shown that Their Proposed Class Satisfies All Four**
24 **Prerequisites of Rule 23(a).**

25 Plaintiffs initially defined the class they seek to represent as follows:

26 All persons who, while residing in the State of Washington, and in
27 connection with a mortgage financing transaction where the loan amount
did not exceed \$1,000,000: (a) paid a premium for the purchase of

1 residential title insurance from First American Title Insurance Company;
2 (b) had an unsatisfied mortgage from an institutional lender; and (c) did not
3 receive the fully and correctly discounted price specified in the applicable
4 First American Title Insurance Company Manual.

5 Pltfs.' Mot. at 3.

6 There are at least two problems with this definition. First, it contains no temporal
7 limitation. Second, the definition conditions a customer's class membership on a finding
8 that First American is liable to him or her. Only those customers who did not receive the
9 "fully and correctly discounted price" are members of the class. So, for example, if the
10 court certified the class and later determined on summary judgment that First American
11 correctly discounted all class members' premiums, then the class would have no
12 members. A "fail-safe class" like this ensures that a defendant cannot prevail against the
13 class, because if the defendant prevails, the class will not exist. *See, e.g., Brazil v. Dell*
14 *Inc.*, 585 F. Supp. 2d 1158, 1167 (N.D. Cal. 2008).

15 In reply, Plaintiffs concede both points. They agree to include only First
16 American customers who purchased insurance on or after November 28, 2003. First
17 American had no opportunity to respond to this proposal, but the court will adopt it for
18 purposes of this order.⁷ They also agree to revise their class definition so that it does not
19 depend on First American's liability, but rather on objective data about First American's
20 customers. The court thus considers the certification of the following class:

21 All persons who, while residing in the State of Washington, and in
22 connection with a mortgage financing transaction where the loan amount
23 did not exceed \$1,000,000: (a) paid a premium on or after November 28,
24 2003 for the purchase of residential title insurance from First American
25 Title Insurance Company; (b) had a lender's title insurance policy that
26 insured the lien of a deed of trust on the same property that had been issued
27 at the scheduled rate; and (c) did not receive the reorganization rate
28 specified in the applicable First American Title Insurance Company
Manual.

Pltfs.' Reply at 14.

⁷ Plaintiffs chose the November 28, 2003 date because it is three years prior to the filing date of the *Lewis* lawsuit in Idaho. Plaintiffs contend that the filing of *Lewis* tolled the statute of limitations for all putative class members, including Washingtonians.

1 **1. Numerosity**

2 A class satisfies Rule 23's numerosity requirement when it has so many members
3 that "joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

4 Putting aside Plaintiffs themselves, there is no evidence in the record of another
5 person who meets Plaintiffs' class definition. Plaintiffs offer no evidence that Mr. Bell,
6 the Kirkpatricks, or the Hoopers had a prior lender title insurance policy. Instead, they
7 provide evidence that each of them had a prior mortgage from an institutional lender.
8 Schwartzman Decl. ¶¶ 7-10. First American neither admits nor denies that these three
9 customers had prior lender policies. Stuczynski Decl. ¶¶ 29-32. It insists, however, that
10 a prior institutional mortgage is not a proxy for a prior lender title policy. *Id.* ¶ 32. As to
11 the 7 customers Plaintiffs selected from First American's 200-record sample, there is also
12 no evidence of any prior lender title insurance policy. As noted, Plaintiffs offer nothing
13 to counter First American's evidence that 5 of the 7 customers were not entitled to the
14 50% discount. As to the remaining 2 customers, no one has produced evidence that they
15 did or did not have prior lender policies.

16 On this evidence, the court is in no position to make even a rough estimate of how
17 many people fall within Plaintiffs' class definition. As many as 170,000 Washingtonians
18 during an unknown time period qualified for discounted rates. How many of them did
19 First American charge more than the discounted refinance rate? No one knows.
20 Plaintiffs invite the court to invent numbers out of thin air. They begin with the
21 unreliable 170,000-customer figure and state that "[e]ven assuming an extremely
22 conservative overcharge rate of 20 percent, the result is 34,0[00] transactions where [First
23 American] overcharged Washington homeowners for title insurance." Pltfs.' Mot. at 8.
24 Plaintiffs offer no basis whatsoever to assume an overcharge rate of 20%, much less a
25 basis to characterize that rate as "extremely conservative." Plaintiffs' analysis of the 200-
26 customer sample that First American produced during discovery suggests that *at most* 2
27 of those 200 customers, 1% of them, overpaid. Plaintiffs argue that even if only 1% of

1 the 170,000 customers overpaid, the class has 1700 members. But for at least two
2 reasons, the court cannot assume that 1% of First American's discount-qualified
3 customers overpaid. First, the only way to arrive at the 1% figure is to assume (without
4 any evidence) that the 2 customers in the 200-customer sample had prior lender title
5 policies. Second, without knowing more about how First American selected the 200-
6 customer sample, there is no reason to assume that the sample is representative of its
7 other 170,000 potentially qualifying customers.

8 In similar cases against First American in other states, courts have taken various
9 approaches to the numerosity inquiry. In several of the cases, the plaintiffs provided
10 much better evidence as to the number of class members. For example, in *Slapikas v.*
11 *First American*, 250 F.R.D. 232, 237 (W.D. Pa. 2008), the plaintiffs subpoenaed one of
12 First American's agents and reviewed nearly 900 files, finding evidence that the customer
13 was overcharged in as many as 67% of those cases. First American disputed that finding,
14 but nonetheless estimated an overcharge rate of 4.4%. *Id.* at 239 n.5. Even First
15 American's dramatically lower estimate implied a class with 20,000 members. In
16 *Campbell v. First American*, 269 F.R.D. 68, 74 & n.4 (D. Me. 2010), plaintiffs identified
17 167 potentially overcharged customers, and First American did not contest numerosity.
18 In this case, Plaintiffs have identified 5 customers who *might* have overpaid, 3 of whom
19 were known to them before they filed suit.

20 In other cases, the court made a numerosity finding without particularized
21 discussion of the evidence plaintiffs offered. In *Lewis v. First American*, 265 F.R.D. 536,
22 554 (D. Idaho 2009), the court discussed Plaintiffs' "evidence, based on a review of
23 several HUD-1 statements, that there are likely thousands of potential class
24 members" The court did not describe this evidence. Similarly, in *Hamilton v. First*
25 *American*, 266 F.R.D. 153, 158-59 (N.D. Tex. 2010), the court described plaintiffs'
26 estimate of more than 50,000 class members, without describing what evidence plaintiffs
27 offered to support that estimate.

1 The court declines at this time to make a finding that the class Plaintiffs seek to
2 represent is or is not sufficiently numerous. The court acknowledges that if First
3 American overcharged even a small fraction of its refinance customers, the total number
4 of customers overcharged would likely satisfy Rule 23's numerosity requirement. For
5 example, assuming that the number of Washington customers who qualified for the 50%
6 discount was roughly 170,000, an overcharge rate of even a tenth of a percent (0.1%)
7 would indicate a class of 170 members. The court's concern with this numerosity-by-
8 assumption approach is that it makes any corporation with a large number of customers
9 vulnerable to a class action without proof of class-wide wrongdoing. Imagine, for
10 example, a Starbucks customer who received an underfilled cup of coffee. By Plaintiffs'
11 logic, that customer could sue on behalf of a class of similarly aggrieved customers by
12 the simple expedient of declaring "if Starbucks underfilled the cups of even a tiny
13 fraction of its millions of customers, then the class is sufficiently numerous." The court
14 declines to sanction that approach.

15 **2. Commonality**

16 Plaintiffs easily satisfy Rule 23(a)(2)'s commonality requirement. Plaintiffs must
17 only show that "there are questions of law or fact common to the class." Although Rule
18 23(a)(2) speaks of "questions" in the plural, a single common issue is sufficient to meet
19 the commonality requirement. *E.g., Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 648 (C.D.
20 Cal. 1996); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)
21 ("The existence of shared legal issues with divergent factual predicates is sufficient, as is
22 a common core of salient facts coupled with disparate legal remedies."). There are
23 several common legal questions: Does Washington law impose strict liability on title
24 insurers who charge their customers in excess of filed rates? Are there any defenses
25 available to an insurer who overcharges? Common factual issues include the filed rates
26 in each Washington county and the differing prerequisites for those rates, and well as
27 First American's policies for determining if a customer qualifies for the 50% discount.

1 The court reserves a discussion of the issues that are not common to all class
2 members for its discussion of Rule 23(b)(3), which requires Plaintiffs among other things
3 to show that common questions predominate over individualized questions. *See Hanlon*,
4 150 F.3d at 1019 (“The commonality preconditions of Rule 23(a)(2) are less rigorous
5 than the companion requirements of Rule 23(b)(3).”).

6 **3. Adequacy and Typicality**

7 Unlike the numerosity and commonality criteria, the criteria of adequacy of
8 representation and typicality focus on the class representatives. *See Hassine v. Jeffes*,
9 846 F.2d 169, 176 (3d Cir. 1988) (“‘[C]ommonality’ like ‘numerosity’ evaluates the
10 sufficiency of the class itself, and ‘typicality’ like ‘adequacy of representation’ evaluates
11 the sufficiency of the named plaintiff[s]”). Rule 23(a)(3) requires that the “claims or
12 defenses of the representative parties are typical of the claims or defenses of the class.”
13 This standard is permissive: claims or defenses are typical “if they are reasonably co-
14 extensive with those of absent class members.” *Hanlon*, 150 F.3d at 1020. Rule 23(a)(4)
15 requires Plaintiffs to show that “the representative parties will fairly and adequately
16 protect the interests of the class.” In determining whether the Plaintiffs are adequate class
17 representatives, the court must consider if they have “any conflicts of interest with other
18 class members” and whether they will “prosecute the action vigorously on behalf of the
19 class.” *Hanlon*, 150 F.3d at 1020.

20 First American contends that the unusual circumstances surrounding Plaintiffs’
21 refinancing means that they are unlike other class members. Plaintiffs did not purchase
22 title insurance directly from First American or from an authorized Washington agent.
23 Instead, they relied on two out-of-state entities, a settlement agent and Alliance. Alliance
24 had authority to issue First American policies, but not in Washington. Alliance charged
25 the settlement agent \$455, but First American contends it received no portion of that
26 premium. First American had no agency relationship with the settlement agent, and it
27

1 appears that the settlement agent alone was responsible for charging Plaintiffs \$821 for a
2 \$455 policy.

3 Even accepting First American's version of the facts, Ms. Boucher is a typical
4 class member in that she allegedly overpaid, and not necessary atypical merely because
5 she is subject to agency-law defenses. Importantly, even if First American bears no
6 responsibility for the settlement agent's conduct in charging Plaintiffs \$821 for a \$445
7 policy, Alliance still charged \$445 for a policy that Plaintiffs argue should have cost only
8 \$367.50. First American must therefore contend with an overcharge of \$77.50 by one of
9 its agents, a claim that is identical in all but amount to the claims of other class members.
10 It is possible that First American will eventually prove that Alliance's actions were those
11 of a rogue agent, and that it bears no responsibility for those actions under principles of
12 agency law. But that is not a foregone conclusion. Moreover, given that First American
13 sells a significant portion of its Washington policies through independent agents, many
14 class members may be subject to agency-law defenses.

15 Because the court will not certify a class today, it will not reach a final conclusion
16 on whether Ms. Boucher's claims are typical of other class members' claims. If Plaintiffs
17 continue their effort to certify a class, they may wish to consider one or more additional
18 class members.

19 The court concludes, however, that Ms. Boucher is an adequate class
20 representative. First American makes much of Ms. Boucher's uncertainty about the
21 details of her 2005 refinance and her admissions that her husband handled many aspects
22 of that transaction. Those differences are immaterial in a case like this one, where the
23 facts essential to establishing liability are likely to come from documentary evidence in
24 the hands of First American or third parties. Proof of Ms. Boucher's claims will require
25 reference to First American's rate manuals, information in First American's records, and,
26 if necessary, information from Ms. Boucher's prior lender about the policy it obtained.
27 Little is required of Ms. Boucher. First American also fails to persuade the court by

1 pointing out Ms. Boucher's unfamiliarity with the legal intricacies of this case. Those
 2 details are for her counsel to master, not her. The record before the court establishes that
 3 Ms. Boucher's counsel is experienced in class litigation and capable of representing the
 4 class. On this record, the court finds that Ms. Boucher and her counsel could adequately
 5 represent the class.

6 **C. On the Record Before the Court, Plaintiffs Have Not Satisfied Rule 23(b)(3).**

7 Plaintiffs rely solely on Rule 23(b)(3) to certify the proposed class. To certify a
 8 Rule 23(b)(3) class, the court must find that "questions of law or fact common to class
 9 members predominate over any questions affecting only individual members, and that a
 10 class action is superior to other available methods for fairly and efficiently adjudicating
 11 the controversy." Fed. R. Civ. P. 23(b)(3). The "predominance" and "superiority"
 12 prongs of Rule 23 work together to ensure that certifying a class "would achieve
 13 economies of time, effort, and expense, and promote . . . uniformity of decision as to
 14 persons similarly situated, without sacrificing procedural fairness or bringing about other
 15 undesirable results." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (internal
 16 citation and quotation omitted). A "central concern of the Rule 23(b)(3) predominance
 17 test is whether 'adjudication of common issues will help achieve judicial economy.'" *Vinole*,
 18 at 944 (quoting *Zinser*, 253 F.3d at 1189). Rule 23(b)(3) provides a non-
 19 exclusive set of factors to guide the court's predominance and superiority inquiries:

20 (A) the class members' interests in individually controlling the prosecution
 21 or defense of separate actions; (B) the extent and nature of any litigation
 22 concerning the controversy already begun by or against class members; (C)
 23 the desirability or undesirability of concentrating the litigation of the claims
 in the particular forum; and (D) the likely difficulties in managing a class
 action.

24 The court must determine whether resolution of common questions would resolve a
 25 "significant aspect" of the class members' claims such that there is "clear justification"
 26 for class treatment. *Hanlon*, 150 F.3d at 1022 (citations omitted).

1 The primary obstacle to both a finding of superiority and a finding of
2 predominance in this case is that Plaintiffs have yet to demonstrate that they can
3 efficiently discover the evidence necessary to prove their claims. Somehow, Plaintiffs
4 must be able to sift through evidence pertaining to as many as 170,000 First American
5 refinance customers and develop the evidence necessary to show that they belong to the
6 class. In their only attempt so far, Plaintiffs largely failed. Plaintiffs have at least a rough
7 means of determining who *does not* belong in the class, because HUD-1 settlement
8 statements coupled with First American's rate manuals seem to quickly reveal who
9 received the 50% discount. If the 200-customer sample that First American produced is
10 any indication, the vast majority of its refinance customers received the discount. But,
11 where a HUD-1 reveals a customer who appears to have overpaid for title insurance,
12 Plaintiffs have not been able to determine whether that customer was actually
13 overcharged. To do so, they need evidence beyond the HUD-1 statement. So far as the
14 record reveals, Plaintiffs have not even attempted to obtain that evidence.

15 Plaintiffs' ability to efficiently assemble the evidence necessary to prove that a
16 customer was entitled to the 50% discount (or not) is critical to both the superiority and
17 predominance inquiry. If Plaintiffs cannot efficiently assemble the evidence, then
18 individualized issues about each customer's transaction will dominate this litigation, and
19 common issues will not predominate. In the same vein, if Plaintiffs cannot find a way to
20 determine who is qualified for the discount on a classwide basis, the court cannot
21 conclude that a class action is superior to individual litigation. Among other things, if
22 Plaintiffs cannot identify who belongs to the class, they will have difficulty notifying
23 class members of this action and their right to opt out of it. *See* Fed. R. Civ. P.
24 23(c)(2)(B) (requiring notice to members of a 23(b)(3) class).

25 On the record before the court, Plaintiffs have not shown that they can assemble
26 the evidence necessary to prove (or disprove) class member's claims. Accordingly, the
27

1 court concludes that they have not satisfied either the predominance or superiority
2 requirements of Rule 23(b)(3).

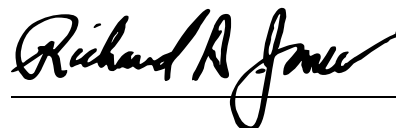
3 **IV. CONCLUSION**

4 For the reasons stated above, the court DENIES Plaintiffs' motion to certify a
5 class.

6 The court denies the motion without prejudice to a renewed motion for class
7 certification. If Plaintiffs renew the motion, they must (at a minimum) demonstrate to the
8 court that they have developed a means of identifying who belongs to the class, and they
9 must show that they have used that methodology to actually identify at least some class
10 members. Plaintiffs may pursue additional discovery in this vein.

11 The court sets a deadline of August 5, 2011 for Plaintiffs to either renew their
12 motion for class certification or formally abandon their class claims. If Plaintiffs seek an
13 extension of this deadline, they must demonstrate with specific evidence that they are
14 diligently pursuing the evidence necessary to support a renewed class certification
15 motion. If Plaintiffs renew their class certification motion, neither party need repeat the
16 arguments they advanced in the instant motion. The court expects the parties to focus on
17 the concerns it articulated in this order.

18 DATED this 2nd day of May, 2011.

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22 The Honorable Richard A. Jones
23 United States District Judge
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